IN THE

Supreme Court of the United States

October Term, 1940

No. 19

HARRY BRIDGES,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITIONER'S BRIEF.

A. L. WIRIN,
501 Douglas Building, Los Angeles,
Counsel for Petitioner.

LEO GALLAGHER,
GROVER JOHNSON,
BEN MARGOLIS,
RICHARD GLADSTEIN,
AUBREY GROSSMAN,
CHARLES J. KATZ,
Of Counsel.

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I.

Opinion Below.

The opinion [R. 136] of the Supreme Court of California is reported in 14 Cal. (2d) 464, 94 Pac. (2d) 983.[1]

[1]Chief Justice Phil Gibson did not participate in the decision of the court below in the case at bar, having been appointed a member of that court subsequent thereto. He did, however, take part in the consideration of the petition for re-hearing and was one of the three justices voting in favor of granting the petition, the court dividing 3 to 4 upon that issue [R. 177]. Justice Gibson expressed his views in the instant case, on the occasion of the decision of the court below in *Times-Mirror Publishing Co. v. Superior Court*, 15 Cal. (2d) 99, 122, pending before this court on certiorari, October term, 1940, No. 64.

II.

Jurisdiction.

1. STATUTORY PROVISIONS SUSTAINING JURISDICTION.

Jurisdiction of this Court is invoked under Judicial Code, Sec. 237 b, as amended by Act of February 13, 1925 (43 Statutes 937).

III.

Statement of the Case.

The petitioner was adjudged guilty of contempt of court by the Superior Court of Los Angeles County, having been held liable by that court for the publication in the public press of the contents of a telegram to Frances Perkins, Secretary of Labor [R. 48-52]. The telegram contained a vigorous and caustic criticism of a judgment of one of the judges of the Los Angeles Superior Court [R. 27].[2] The petitioner was fined $125.00 and in the alternative, was given a jail sentence of five days in the Los Angeles County Jail. The judgment of conviction was affirmed by the Supreme Court of California.

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[2]The text of the telegram, as well as the facts concerning its dispatch and publication, is set forth in the petitioner's brief later (*infra* pp. 28-29).

IV.

Specification of Errors.

The petitioner assigns the following errors in the record and proceedings below:

The Supreme Court of California erred in its decision and judgment, in the following particulars:

(1) In ruling that the judgment of conviction of the petitioner for contempt of court by publication does not deprive the petitioner of due process of law under the Fourteenth Amendment to the Constitution of the United States, by impairing the petitioner's right to freedom of speech and freedom of the press, as guaranteed by said due process clause; and particularly,

(a) in rejecting the "actual obstruction" principle

(b) in refusing to apply the "clear and present danger" rule, and

(c) in applying the "tendency" test; such latter test being "too vague and indefinite" to constitute an adequate standard of guilt.

(2) In ruling that the judgment of contempt does not deprive petitioner of due process of law, by denying to the petitioner the right to petition the government for a redress of grievances.

(3) In ruling that the contempt conviction does not deny the petitioner due process, by abridging his constitutional right to engage in a lawful occupation, to-wit: that of a labor union official.

(4) In ruling that the contempt judgment is supported by evidence sufficient to sustain a conviction.

V.

Summary of Argument.

Point 1.

The "inherent tendency" and "reasonable tendency" tests, applied by the California courts to publication pertaining to issues pending in the courts, are too vague and indefinite; as such they offend due process of law and deprive the petitioner of freedom of speech and freedom of the press, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

Only the application of either the "clear and present danger" rule or the "actual obstruction" principle to publications alleged to be in contempt of court will reconcile the independence of the judiciary with freedom of the press.

Point 2.

The petitioner was deprived of due process of law and freedom of speech and of the press, in that the judgment of conviction of contempt of court denied the petitioner the right to petition the government for a redress of grievances.

Point 3.

The petitioner was denied due process in that his right to follow a lawful occupation, to-wit: that of a labor union official, was unduly impaired by the contempt judgment.

Point 4.

There is no evidence to support the conviction of contempt. A contempt judgment, based upon a publication, in the absence of supporting evidence, denies Federal due process.

VI.

Argument.

Point 1.

The "Inherent Tendency" and "Reasonable Tendency" Tests, Applied by the California Courts to Publication Pertaining to Issues Pending in the Courts, Are Too Vague and Indefinite; as Such They Offend Due Process of Law and Deprive the Petitioner of Freedom of Speech and Freedom of the Press, as Guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

Only the Application of the "Clear and Present Danger" Rule or the "Actual Obstruction" Principle to Publications Alleged to Be in Contempt of Court Will Reconcile the Independence of the Judiciary With Freedom of the Press.

(a) THE "INHERENT TENDENCY" AND "REASONABLE TENDENCY" TESTS, APPLIED BY THE CALIFORNIA COURTS TO PUBLICATION PERTAINING TO ISSUES PENDING IN THE COURTS, AS APPLIED, VIOLATE FREEDOM OF THE PRESS.

The classic criticism of the "tendency" doctrine, as a test of the legality and constitutionality of utterances in general, is contained in Jefferson's Virginia Statute on Religious Liberty:

> "To suffer the civil magistrate to intrude his power into the field of opinion, or to restrain the profession or propagation of principles, on supposition of their ill *tendency*, is a dangerous fallacy, which at once destroys all . . . liberty, because he, being, of course, judge of that tendency, will

> make his opinions the rule of judgment and approve or condemn the sentiments of others only as they shall square with or differ from his own." (Italics ours.)[3]

Many Americans, from Thomas Jefferson to the Justices of this Court have protested the utter inadequacy of the "dangerous tendency" test; statesmen and jurists alike have joined for many generations in the search for a standard of guilt, in cases involving speech, less "vague and indeterminate" than one that lodges unregulated and limitless power, without any objective criteria, in a single judge, to determine what the people may, or may not, speak.

Of the founding fathers, Jefferson was not alone in rejecting the doctrine; James Madison joined with him. Nor were they first in condemning it. On the contrary, they were but the heirs of a great tradition of freedom from persecution for the mere expression of opinion—a tradition built by the great thinkers, philosophers and statesmen of many lands and through the ages, all of whom have insisted on some accompanying overt act or actual injury, or some proximate relationship between word and deed, to justify punishment for utterance or publication. Among them may be listed:[4]

St. Hilary, A. D. 335; Theodosian (in Theodosian Code) 438; Martin Luther, 1535; John Milton, 1644; Jeremy Taylor, 1647; Edward Bagshaw, 1660; John Owen, 1667; John Locke, 1667; Thos. Delaune, 1683; Hubert Languet, 1579; Roger Williams, 1630; John Wy-

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[3]Quoted with approval in part by this Court in *Reynolds v. U. S.* 98 U. S. 145, 163.

[4]From Theodore Schroeder, "Constitutional Free Speech," p. 395.

cliffe, 1729; Charles Montesquieu, 1748; The Bishop of St. Davids, 1763; Robert Norris, 1770; Jeremy Bentham, 1776; Tunis Wortman, 1800.

This Jeffersonian point of view is substantially adopted by this Court, in *Herndon v. Lowrey*, 301 U. S. 242, in which the "dangerous tendency" view was rejected as "too vague and indefinite" a test, since such standard permitted punishment of the "fair use of the opportunity for expression of political opinion." It "licenses the jury to create its own standard of guilt in each case," leaves the whole case to the pure "speculation" of a jury, and "permits the punishment of all utterances when unjust and unreasonable in the estimation of a court and jury." Such "vague and indeterminate boundaries," this Court held to constitute a "dragnet which may immesh anyone" who dares to exercise his constitutional right of freedom of speech.

The "tendency" doctrine is effectively refuted in addition by Chief Justice Gibson in the court below, dissenting in the *Times* cases:[5]

> "The test adopted by the majority opinion is the *tendency* of the publication to influence the proceeding. Under this test the inquiry is not as to what happened, but as to what might have happened. It is the supposed *tendency* of the publication to affect and not its *actual effect* which is involved. It is not the trial judge himself, but an hypothetical judge with whom the test is concerned. Denial by the accused of any intention to influence is futile, since the *tendency alone* is considered. Denial by the judge

[5] 15 Cal. (2d) 99, 122. Record in *Times-Mirror Co. v. Superior Court*, October term, 1940, No. 64, p. 140.

that he was in fact influenced is likewise no defense, and indeed is not even relevant. It is not material to inquire whether the publication was seen or read by the judge or jury, since this would throw light only upon its actual effect (italics ours).

"This test is so vague and elastic, varying with the viewpoint of the individual judge who cites the offender, that it necessarily places an unreasonable restraint upon free speech and press. In the first place, the establishment of so loose a rule provides a temptation for the judge to invoke the power over contempt as a means of prohibiting political or personal attacks upon him or his views. We are all well aware of the constantly broadening scope of the judiciary as an interpreter of constitutional and statutory policies in the field of government, and there is grave danger in permitting a court to ward off criticisms directed at its policies, under the guise of protecting a particular court proceeding from improper influences.

"In the second place the test permits the placing of restraints on speech and press as varied as the sensitives of a particular judge."

This view is in accord with the understanding by judges and lawyers of the conventional concept of "due process of law" in all criminal prosecutions: that the standard of guilt be sufficiently fixed, clear and certain, so that the average person may, upon the exercise of reasonable intelligence and circumspection, know when he is violating the law.[6]

This statement of the law, moreover, is in accord with the view of this Court announced, since the decisions in

[6] *Cf. Lanzetta v. New Jersey*, 306 U. S. 451.

the instant and in the *Times* cases by the court below, to the effect that state action limiting freedom of expression upon a formula "sweeping within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech and of the press," violates due process. Such a general, sweeping and indeterminate formula "readily lends itself to harsh and discriminatory enforcement by the local prosecuting officials against particular groups deemed to merit their displeasure," and "results in a continuous and pervasive restraint on all freedom of discussion."[7]

The conviction of the petitioner is "analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application."[8]

Every argument and criticism directed against the "dangerous tendency" tenet as an inadequate and unconstitutional criterion to determine the legality of political utterances, apply with even greater force to discussions in the public press, of matters pending in the courts.

If as a criterion of guilt the "dangerous tendency" creed is invalid under the Constitution because it is too vague, uncertain, and indeterminate, as applied to political expression generally; if, further, the doctrine "permits the punishment of all utterances when unjust and unreasonable in the estimation of a court and jury,"[9] *a fortiorari*, such a dogma must be rejected when that test is administered by a judge alone, without a jury.

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[7]Justice Murphy in *Thornhill v. Alabama*, 310 U. S. 88.

[8]*Cantwell v. Connecticut*, 310 U. S. 296, 308.

[9]Justice Roberts in *Herndon v. Lowery*, *supra*.

The frequent criticism directed both by lawyers and judicial scholars against the courts because of their alleged abuse of authority in administering the delicate but potent contempt power is well known; frequently, the alleged contempt consists of a critical reference to the judiciary so as to arouse strong feeling on the part of the judge; often the same judge who has deemed himself affronted or his dignity wounded, acts as prosecutor as well as judge; in any event, any judge who may be presiding over the "summary" hearing approaches the problem with a strong, if perhaps often subconscious, feeling of loyalty to the fraternity of judges, as well as determination to uphold the "integrity" of the courts.

Denied the right to "put himself upon his country," by a trial by a jury[9a] of common folk who might be expected to take a "common sense" view of the authority of the courts and the rights of the people, prosecuted either by the judge who will "summarily" determine in favor of the wisdom and legality of the prosecution, or by private zealots, as in the instant case, bent upon vindicating the "dignity" of the judiciary, what chance has a defendant, whose guilt is determined in terms of the vague contours of the "dangerous and inherent tendency" formula? Certainly Thomas Jefferson's protest that such a rule destroys all liberty in that the magistrate, "being the judge of that tendency, will make his opinions the rule of judgment," applies to the judge who sets out to right the wrongs committed against the judiciary.

How are newspaper publishers, editors, reporters and labor leaders, assuming that they are persons of average

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[9a]The California court ruled that the petitioner was not entitled to a jury trial.

intelligence, to divine at which point the exercise of their liberty of the press is metamorphosed into criminal conduct, when the measuring-rod contracts and expands dependent upon the self-restraint or vindictiveness of the particular judge who may be sitting in judgment?

Is a standard of guilt so vague and indeterminate, anything other than a "dragnet"[10] to enmesh any newspaper publication or trade union utterance which offends any judge or magistrate?

Does this formula, applied to alleged contempts by publications, not "readily lend itself to harsh and discriminatory enforcement," and thus result "in a continuous and pervasive restraint on all freedom of discussion"[11] pertaining to every issue that may be pending in any court?

For yet another reason is the "tendency" doctrine an inadequate and impractical test.

In a constitutional democracy, the courts are both the appropriate, and inevitably the final, arbiters of all the great current controversial issues of the day. At the heart of a democracy is the right of the people, through the press and through every other method of communication of opinion, to discuss those issues. To curb such expression of opinion, merely because such discussion may have a "tendency" to "embarrass" or influence a judge somewhere before whom there may be pending litigation involving one of those issues, abridges, if it does not nullify, the right of public discussion. The ever present threat of punishment for contempt of court for publications having that "tendency" would constitute an effective

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[10]From Justice Roberts in *Herndon v. Lowery, supra.*

[11]From Justice Murphy in *Thornhill v. Alabama, supra.*

restraint upon such expression of opinion at all times upon every public issue.

Examples of great issues pending for many years in the courts come readily to mind—slavery,[12] legal-tender,[13] child labor legislation,[14] social security enactments,[15] labor legislation[16]—all find their way for arbitrament ultimately in the judicial forum. To restrain discussion of such problems, while they wend their way leisurely through the courts, is to deny the people the right to engage in public discussion upon the live and important issues of the time—the only issues that matter.

The "tendency" rule, moreover, if enforced, would actually impede the administration of justice; for it would make it difficult, if not impossible, for minority groups adequately to seek redress in the courts. Particularly would the weak, the unpopular and the helpless in the community—to whose rescue this court has come so frequently in recent months—continue to remain defenseless. Here again, instances are legion.

The "tendency" formula would have made it impossible for millions of Americans, first to know about, and then to interest themselves in the fate of Tom Mooney. But for such widespread and articulate concern in Mooney, he would not be alive today. That case was "pending" in one court or another for over twenty years. Without the right to discuss the guilt or innocence of Mooney, the

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[12] *Dred Scott v. Sanford*, 19 How. 393.

[13] *Legal Tender Cases*, 12 Wall. 457.

[14] *Atkins v. Children's Hospital*, 261 U. S. 525.

[15] *Helvering v. Davis*, 301 U. S. 619.

[16] *National Labor Relations Board v. Jones & Laughlin*, 301 U. S. 1.

American Civil Liberties Union and other cooperating organizations would have been prevented from collecting sufficient funds to bring the case to the attention of this court,[17] or otherwise to finance the defense through the many other court proceedings.

The rule would, moreover, have doomed to death the Scottsboro boys,[18] as well as other defenseless Negroes saved from the hangman's noose by this court: for it would have impeded the activities of the National Association for the Advancement of Colored People and other groups who found it necessary to, and did, discuss the "merits of the case" while appeals were pending in the courts.

Similarly, Angelo Herndon[19] would now be serving his 18 to 20 year sentence upon a Georgia chain gang, and this court would never have had an opportunity to intervene in his behalf, were it not for the International Labor Defense; and that organization, in turn, would have been unable to arouse sufficient public interest in the innocence of Herndon, and thus raise the necessary funds to pay for the expense of an appeal to this court, if subject to the "pervasive restraint" of a conviction for contempt because of publications "tending" to influence the administration of justice in Alabama.

Indeed, it may be said that *Lochner v. New York*, 198 U. S. 45, and not *Muller v. Oregon*, 208 U. S. 412, would be the law today were such a rule in effect: for the National Consumers League would have found it impossible

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[17] *Cf. Mooney v. Holohan*, 294 U. S. 103. Mooney was pardoned by the present Governor of California.

[18] *Powell v. Alabama*, 287 U. S. 45; *Norris v. Alabama*, 294 U. S. 587.

[19] *Herndon v. Lowrey, supra.*

to function effectively were its right to discuss the merits of maximum hour legislation impeded by the threat of such a rule of contempt of court.

Without the right to discuss causes pending in the courts, free from the threat of prosecution for contempt, it would have been impractical for the American Bar Association, through its Bill of Rights Committee, to have reached its thousands of members scattered throughout the United States in order to receive permission to appear as a friend of this Court in the *Hague* and *Gobitis* cases.[20]

Finally, neither the American Federation of Labor, nor the Congress of Industrial Organizations would have been able to bring to this Court *Thornhill v. Alabama* and *Carson v. California, supra*, if it is the law that discussion among members of a labor union of the nature of the right to picket is outlawed because of the remote and speculative "tendency" of such discussion to embarrass or to influence some judge somewhere who may have that constitutional issue under consideration.

A rule which thus proscribes the expression of opinion strikes a foul, if not fatal, blow at the democratic, and American, way of life.

The trial court below adopted the "inherent tendency" rule and, applying it to the evidence, found the petitioner guilty of contempt [R. 156-159].

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[20]*Hague v. C. I. O.* (1939), 307 U. S. 496; *Minersville School Dist. v. Walter Gobitis*, U. S. Supreme Court, 84 L. Ed. 993, 60 Sup. Ct. Rep. 1010.

The Supreme Court of California, although asserting that it was rejecting that rule, in effect, adopted it. It merely changed its name to "reasonable tendency" test.[21]

This test, as applied by the California Supreme Court to the petitioner, abridged his freedom of speech and of the press.

(b) THE "CLEAR AND PRESENT DANGER" RULE, APPLIED TO PUBLICATION ALLEGED TO BE IN CONTEMPT OF COURT; AND APPLIED TO THE PETITIONER.

(1) *The "Clear and Present Danger" Test.*

First entering the mansions of the law in 1917,[22] the "clear and present danger" rule, became the law of the land in 1937.[23] Its classic and most comprehensive expression is by Justice Brandeis in his (and Justice Holmes') concurring opinion in *Whitney v. California*, 274 U. S. 357, Justice Brandeis declaring:

> "That the necessity which is essential to valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled."

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[21]The court below erroneously, and, we believe, inadvertently stated that the petitioner was relying upon the "inherent and dangerous tendency" rule [R. 158]. This is incorrect. The petitioner urged *against* the adoption and application of such a formula.

[22]*Schenck v. U. S.*, 249 U. S. 47, at 52.

[23]*Herndon v. Lowrey, supra.*

In the last term of this Court the rule was expounded and extended by the Court, by both Justices Murphy and Roberts.[24]

The court below, however, expressly rejected this test as applicable to alleged contempt by publication and refused to apply the rule to petitioner [R. 156-159].

(2) The "Clear and Present Danger" Test Applied to Publications Allegedly Contemptuous.

That the state (the government) has both the right and the duty to protect itself from destruction is beyond doubt. Yet the state, it is now authoritatively adjudicated, may not penalize uterances and publications "tending" to destroy the government.

That the courts have the authority and the obligation to safeguard themselves from obstructions, interferences and outside influences concerning pending cases, is equally settled; *a fortiorari*, the courts may not, without invading constitutional guarantees of freedom of speech and of the press, punish publications "tending" to, or having the "inherent tendency" to obstruct, interfere with, or improperly to influence the courts.

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[24] Justice Murphy in *Carlson v. California*, 310 U. S. 106, 113:

"But the ordinance in question here abridges liberty of discussion under circumstances presenting no clear and present danger of substantive evils within the allowable area of state control."

Justice Roberts in *Cantwell v. Connecticut*, 310 U. S. 296, 308:

"When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appear, the power of the State to prevent or punish is obvious. Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."

Interferences with the judiciary admittedly constitute "substantive evils," which the courts may constitutionally prevent by appropriate measures. In dealing with such evils the Congress of the United States may penalize the expression of opinions, only when "there is a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[25] The states in enacting legislation designed to curb serious evils, may not constitutionally restrict utterances "unless speech would produce, or is intended to produce a clear and present danger of some substantive evil which the state constitutionally may prevent.[26]

We are unable to apprehend any distinction, either in fact or in law, which would make the judiciary immune from constitutional limitations, and authorize the courts to take steps in self-protection against interferences and embarrassments which the legislatures may not take to protect the state and federal governments from threatened destruction by force and violence.

The legislatures, it is conclusively determined, must recognize freedom of speech and of thought as "the matrix, the indispensible condition of nearly every other freedom . . . without which neither liberty nor justice would exist;"[27] encroachment upon that right by state legislation "violates those fundamental principles of liberty and justice that lie at the base of all civil and political institutions;"[28] the legislative department of our three-branch system of government must recognize that

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[25]*Schenck v. United States, supra.*

[26]*Whitney v. California, supra.*

[27]*Palko v. Connecticut*, 302 U. S. 319.

[28]*Grosjean v. American Press*, 297 U. S. 233.

"the ultimate good is better reached in free trade in ideas;"[29] and state authorities must "eschew silence coerced by law—the argument of force in its worst form,"[30].

Are not the judges bound by the same constitutional principles, guarantees and limitations?

The states have been enjoined in devising ways to prevent serious evils, to remember Blackstone ("the liberty of the press is indeed essential to the nature of a free state") and Madison ("to the press alone the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression");[31] and ever to bear in mind that "a free press stands as one of the great interpreters between the government and its people. To allow it to be fettered is to fetter ourselves."[32]

Further, "legislative intervention can find constitutional justification only by dealing with the abuse of speech;"[33] before a state may penalize even utterances of a defined character there must first appear "a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution."[34]

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[29] *Abrams v. United States*, 250 U. S. 616.

[30] *Whitney v. California*, *supra*.

[31] *Near v. Minnesota*, 283 U. S. 697.

[32] *Grosjean v. American Press Co.*, *supra*.

[33] *DeJonge v. Oregon*, 299 U. S. 353.

[34] *Herndon v. Lowrey*, *supra*.

These constitutional limitations upon legislative and executive authority apply with equal, if not greater, force against judicial exercise of the contempt power when that authority is asserted against mere utterance and publication.

The legislation considered by this Court in the cases in which the "clear and present danger" rule was evolved and formulated were all intended to protect the government: state criminal syndicalism acts, criminal anarchy laws, and sedition laws to preserve the state governments from destruction by force and violence; the federal Espionage Act, enacted by Congress to protect the federal government and its agencies from interference during the great emergency of the World War. The judiciary constitutes one branch of our government; no matter how admittedly important or indispensable a part of that government, the courts have no greater power to protect themselves from interferences than the whole government has to preserve itself from destruction. The part can have no greater authority of self-protection than does the whole.

If this Court adopts and applies the "clear and present danger" rule to alleged contempts by publication, we suggest the following elements as essential to sustain a judgment of conviction for contempt:

(A) The publication must have come to the attention of the judge before whom the cause is pending.

(B) There must be evidence of, and a finding of, an express intent to influence the judge. Publication, *per se*,

of an opinion concerning a pending case, addressed to the general public, constitutes an *exercise* of the right to freedom of the press; communication to the judge (whether successful or unsuccessful) constitutes the *abuse*, which may be penalized.

> ". . . Legislative intervention can find constitutional justification only by dealing with the *abuse*. The *rights* themselves must not be curtailed." *DeJonge v. Ore.*, 299 U. S. 353 at 364. (Italics ours.)

Judicial intervention should be measured by the same standard as legislative invasion.

> ". . . we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country," Justice Holmes, dissenting, in *Abrams v. U. S.*, 250 U. S. 616, 630,"

should apply to the judges, as well as to the legislators.

(C) The contents of the publication must be such as would influence a judge of ordinary firmness and "fortitude."[35]

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[35]Justice Holmes, dissenting in *Toledo Newspaper Co. v. U. S.*, 247 U. S. 402, 422.

(3) The "Clear and Present Danger" Test Applied to the Petitioner.

Applied to the instant case, the "clear and present danger" rule would require annulling the judgment of conviction and a ruling that the judgment abridges free speech, for the reasons that:

(A) There is no evidence in the record in the instant case that the publication of the telegram came to the attention of the court before whom the cause was alleged to be pending.

(B) The evidence not only discloses *no* express intent to influence any judge of the Superior Court of California, but is, on the contrary, affirmatively to the effect that the petitioner had no such intent. The trial court upon the conclusion of the hearing expressly stated:

> "I do not think it (the telegram) was sent with the specific intent of influencing Judge Schmidt in his decision." [R. 47.]

(C) The contents of the telegram, although a vigorous and forthright protest against Judge Schmidt's decision, would not influence a judge of ordinary firmness and fortitude.

Freedom of speech includes the right to criticize.

> ". . . If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate." (Justice Holmes, dissenting, in *U. S. v. Schwimmer*, 279 U. S. 644, 654.)

(c) THE "ACTUAL OBSTRUCTION" PRINCIPLE APPLIED TO PUBLICATIONS ALLEGED TO BE IN CONTEMPT OF COURT; AND TO THE PETITIONER.

(1) *The "Actual Obstruction" Principle Applied to Allegedly Contemptuous Publications.*

It was Justice Holmes who, with Justice Brandeis, fathered the "actual obstruction" principle as applied to contempt by publication.

Dissenting (with Justice Brandeis) in *Toledo Newspaper Co. v. United States*, 247 U. S. 402, at 422, he asserted that an *actual* obstruction of justice was necessary in order to support a conviction for contempt of court based upon discussion of a pending case.

Justice Holmes could not find any evidence in the case that there was "anything that obstructed the administration of justice in any sense" that he could possibly give to those words.

Because in his opinion "there was no emergency" and "there was nothing to warrant a finding that the administration of justice was obstructed" he joined with Justice Brandeis in urging the reversal of the conviction.

Two liberal state courts have adopted the Holmes-Brandeis view. Thus, the Supreme Court of South Dakota, in *State v. American News Company*, 64 S. D. 385, at 397, ruled: "that any publication, to be punishable as contempt, should be embarrassing or obstructive to the administration of justice in a pending case, and *obstructive* in fact rather than in theory or by possibility." (Italics ours.)

We quote further from the opinion (at 398):

". . . We believe that in all contempt cases the distinction should be borne in mind throughout between a merely defamatory publication and an *actually obstructive publication*. We think the courts should reserve the use of the weapon of contempt for such publications as can fairly and reasonably be said likely in point of *actual fact* to intimidate, influence, impede, embarrass, or obstruct the court in the due administration of justice in an actually pending matter. And we entertain the opinion that if error is made in either direction in determining that question, it is better and wiser to err in favor of absolute and unrestricted freedom of speech rather than in the other direction . . ." (Italics ours.)

Similarly, the Supreme Court of Indiana is in accord with the requirement that an actual interference with the Courts is necessary to support a conviction for contempt of Court by publication.

That Court decided in *Nixon v. State*, 207 Ind. 426, at 440, 193 N. E. 591:

"The right to freely comment and criticize the action, opinions, and judgments of courts is of primary importance to the public generally. It is not only good for the public, but has a salutary effect upon the courts and judges as well. Courts and judges are not and should not be above criticism, and as long as they are not impeded in the conduct of judicial business by publications having the direct tendency and *effect* of obstructing the enforcement of

their orders and judgments, or of impairing the justice and impartiality of verdicts, there is no right to enforce a contempt proceeding.

"We do not think it is the policy of the law to unduly extend the doctrine of contempt proceedings as applied to publications claimed to impede, interfere with, or embarrass the administration of justice. It must clearly appear that such publications *do* impede, interfere with, and embarrass the administration of justice before the author of the publication should be held for contempt." (Italics ours.)

This actual obstruction test was in effect adopted by Chief Justice Gibson dissenting below.

(2) The "Actual Obstruction" Principle Applied to the Petitioner.

There is no claim in the contempt charges against the petitioner, no evidence, admitted in the course of the trial, nor any finding by the trial court of the court below, of an "actual obstruction," or actual interference with the administration of justice. Both the trial court and the Supreme Court of California ruled that no such showing was necessary [R. 158-159].

The adoption and application by this Court of the "actual obstruction" principle accordingly would require a reversal of the conviction of the petitioner.

Point 2.

The Petitioner Was Deprived of Due Process of Law and Freedom of Speech and of the Press, in That the Conviction of Contempt of Court Denied the Petitioner the Right to Petition the Government for a Redress of Grievances.

(a) THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES IS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES; IT IS THEREFORE FUNDAMENTAL IN ITS NATURE AND SHOULD BE LIBERALLY CONSTRUED.

The right to send a telegram to the Secretary of Labor protesting against the decision of a local judge and the right to give publicity to such a telegram, is merely a manifestation of the right to petition the government for a redress of grievances.

This right is one of the oldest and one of the most universally accepted, of the common law political rights of Englishmen and Americans. It is specially incorporated in and guaranteed by the First Amendment.

2 Story, *Commentaries on the Constitution* (5th edition), Sections 1894-1895;

1 Cooley, *Constitutional Limitations* (8th edition), pages 728-729.

There should be no doubt that it is guaranteed and protected by the Fourteenth Amendment. Certain it is that there is a widespread, and justified, belief that "neither liberty nor justice would exist if" it "were sac-

rificed." It constitutes "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[36]

This right "being in favor of the liberty of the people, must be given the most liberal and comprehensive construction."

State v. Butterworth, 142 Atl. 57 (N. J.)

Any possible abuse of the right to petition the government is of far less danger than is the necessity of maintaining that traditional and fundamental right against invasion from any source.

(1) *A Petition to the Government Is a Privileged Communication and the Privilege Is Forfeited Only if Express Malice Is Established.*

In the case of *Thorn v. Blanchard*, 5 Johns 507 (N. Y.), the court considered a libel action based on alleged libelous statements contained in a petition to remove the plaintiff from a public office. In reversing a judgment for the plaintiff, the court said (at 529):

> "The case before us cannot be considered as an ordinary libel, where malice is to be implied from the face of the libel. It was, at all events, incumbent on the prosecutor to prove express malice: to demonstrate that an evil intention existed: to show . . . that the petition was entirely false, malicious and groundless, and instituted not with a design to go through with it, but only to expose the defendant's character, under the show of a legal proceeding."

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[36]From Justice Cardozo in *Palko v. Connecticut, supra.*

Similarly, in *White v. Nicholls*, 3 How. 266, 11 L. Ed. 591, it was held that such a petition is privileged and that in a libel suit the plaintiff must establish malice in order to prevail.

This rule should be followed here. The petition being directed to a Federal agency, the Federal law controls. Certainly a state court should not be permitted to override the Federal rule with regard to the privilege attached to a petition directed to a Federal agency.

The cases in which communications were held privileged because they were sent to public officials and directed to a redress of grievances are many. Some of them are:

Tyree v. Harrison, 100 Va. 540, 42 S. E. 295;

Harris v. Huntington, 2 Tyler 129 (Vt.);

Kent v. Bongartz, 15 R. I. 72, 22 Atl. 1023;

Gray v. Pentland, 2 Serg. & R. 23 (Pa.);

Decker v. Gaylord, 35 Hun. 584 (N. Y.), (42 Sup. Ct. Rep. N. Y.);

Blakeslee v. Carroll, 64 Conn. 223, 29 Atl. 473;

Howard v. Thompson, 21 Wend. 319 (21 N. Y.);

Harwood v. Keech, 4 Hun. 389 (N. Y.);

Young v. Richardson, 4 Ill. App. 364;

Shields v. Commonwealth, 55 S. W. 881 (21 Ky. L. 1588);

Reid v. Delorme, 2 Brev. 76 (S. C.) (L. Rep. 1-2);

Keenan v. McMurray, 34 Pittsb. Leg. J. N. S. 223 (Pa.);

Hancock v. Mitchell, 98 S. E. 65 (83 W. Va. 156);

O'Donaghue v. M'Govern, 23 Wend. 26, 30, 32, (23 N. Y.).

These cases clearly establish that one who exercises the right here under consideration cannot be punished therefor, at least without a showing of malicious intent. The exercise of the constitutional right to petition ought not to be punished as a contempt, accordingly, without a showing that the alleged contemnor was motivated by an express desire to influence or embarrass the court in an improper manner.

The evidence which constitutes the basis of the petitioner's conviction is substantially as follows:

For some time prior to the dispatch of the telegram complained of, on ~~March~~ Jan. 24, 1938, there had been litigation in the Superior Court of Los Angeles County, entitled "Walker v. I. L. A.," No. 420356. One of the issues in that suit was the possession of the hiring hall maintained for the longshoremen of the San Pedro port, California. On ~~March~~ Jan. 21, 1939, after a trial upon the merits, the Superior Court, Judge Reuben Schmidt presiding, made and filed a permanent judgment and injunction by the terms of which a receiver was appointed to take possession of and to administer the hiring hall.

The telegram read as follows:

> "This decision is outrageous considering I. L. A. has 15 members (in San Pedro) and the International Longshoremen-Warehousemen's Union has 3000. International Longshoremen-Warehousemen Union has petitioned the Labor Board for certification to represent San Pedro longshoremen with International Longshoremen Association denied repre-

sentation because it represents only 15 men. Board hearing held; decision now pending. Attempted enforcement of *Schmidt* decision will tie up port of Los Angeles and involve entire Pacific Coast. International Longshoremen-Warehousemen Union, representing over 11,000 of the 12,000 longshoremen of the Pacific Coast, does not intend to allow State courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board."

The petitioner, under oath, at the trial disavowed any intention to influence the court. The trial judge, in his judgment at the time of imposition of sentence, found that the telegram was not sent by the petitioner "with the specific intent of influencing Judge Schmidt in his decision" [R. 47].

Nor was there any evidence that the petitioner knew that, after the entry of judgment, the proceedings were still technically pending. On the contrary, he testified that he believed that with the entry of judgment the proceedings had terminated; and, further, that he had no knowledge of the pendency of motions for a new trial and to vacate the judgment [R. 116, 122-123]. This testimony was uncontradicted. The motions were filed March 24, 1939. On January 22nd an order was made by the trial judge staying proceedings in connection with the receivership order.

The uncontradicted evidence is that the petitioner dictated the telegram to his secretary; he did not, himself,

release the contents to the press, nor did he instruct any person so to do [R. 114].

No instructions were given by the petitioner to his secretary, except that it be sent [R. 114]. At the same time he dictated substantially the same telegram to the Chairmen of the National Maritime Commission and the National Labor Relations Board [R. 109-110].

The petitioner testified that he had been requested, as an officer of a labor union, by the Department of Labor and other Federal agencies concerned with industrial peace, to advise such agencies of situations that endangered industrial peace [R. 110-112].

He further testified that the sole purpose for sending the telegrams to these governmental departments was to comply with such request and to advise these governmental agencies of a situation which in his opinion, required the assistance of these Federal departments.

Pursuant to office routine, a copy of the telegram reached the desk of James D. O'Neil, the Public Relations Director of the C. I. O., who determined in his own judgment that the contents of the telegram were newsworthy, and who released the contents to the press [R. 102, 103]. This release was in accordance with the authority of Mr. O'Neil, as Public Relations Director, to determine what items were newsworthy [R. 100, 103-104, 115-116].

The release to the press was made by Mr. O'Neil without any instructions or communication from the petitioner [R. 104]; nor did the petitioner have any conversation

with Mr. O'Neil concerning the telegram or its release to the press [R. 103-104, 114].

The petitioner, as a representative of the longshoremen's union, manifestly believed that the union was aggrieved by the decision of the Los Angeles Superior Court; in communicating such grievance to the appropriate Federal governmental agency, to whom the Congress has delegated authority to seek to substitute industrial peace for threatened industrial disturbance, the petitioner was exercising in good faith the modern right of petitioning the government for a redress of grievances.

(2) The Publication in the Press Was Unavoidable and Was a Necessary Part of the Petition Itself.

The petitioner in sending the telegram complained of was acting on behalf of a union with thousands of members, scattered throughout the United States. All of them were entitled to know of the petitioner's communication to the Federal government in their behalf. Manifestly, any method selected by the petitioner to inform these members of his union of his communication with the United States Department of Labor would have resulted in the telegram becoming public. Unless the petitioner undertook to maintain secrecy and thus violate his duty to the membership of the union which he headed, publicity could not be avoided. The alternative to complete secrecy and concealment from the membership of the union was, under the circumstances, widespread publicity.

Even if such secrecy and concealment were possible, its desirability is doubtful. No one will contend that trade

union democracy is an end to be avoided. Yet, the procedure which would have been required to avoid the contempt prosecutions in this case, would have been the very opposite of union democracy.

Furthermore, as is admitted by all concerned, the question was one of great public concern. The *public* had a right to know what steps were being taken to prevent a possible tie-up of shipping. The petition in its very essence was a *public* and not a *private* matter. The fact that the Federal government was being called upon to act, and the response or failure to respond to such call, were of vital concern to the people of the Pacific Coast. Again, in a democracy, secrecy concerning such matters is both a method and end, to be studiedly eschewed.

(3) *The Right to Petition for a Redress of Grievances by Communicating With an Appropriate Federal Agency, Accordingly, Includes the Right to Make Said Communication Public.*

In its very essence, a petition to the government is a *public, not a private,* matter. Suppression or concealment of petitions to the government would be contrary to the fundamental democratic principle upon which this very right is based. Going a step further, this prerogative is a basic element of a democratic form of government; such a form of government requires the conduct of *public* affairs *publicly*. Therefore to deny the right to make public a petition is effectually to deny and nullify the right to petition itself.

That there are limits to the exercise of the right to petition, as to all rights, constitutional or otherwise, is not denied. In the absence of a showing of an express intent to influence or embarrass proceedings in a State court, however, punishment for the public exercise of the right to petition a federal agency abridges that right, in defiance of constitutional guarantees.

(4) *The Contempt Conviction Invades the Authority of the Federal Government.*

Only the government agency to which a petition is directed ought to be permitted to control its publication. To permit the State courts, by means of the asserted "inherent" contempt power to mete out punishment for the publication of an address to an agency of the Federal government, is to suffer and encourage serious impairment of both the authority and the function of such agency. The ever present threat of such contempt prosecutions would discourage appropriate communications with such federal departments.[37]

The federal Constitution should be construed to encourage such communications, not to tolerate "under the guise of regulation" the imposition of criminal penalties by state courts upon the exercise of this important and traditional federal right.

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[37] "The freedom of speech and of the press guaranteed by the Constitution embraces, at the least, the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill v. Alabama, supra.* (Italics ours.)

Point 3.

The Petitioner Was Denied Due Process in That His Right to Follow a Lawful Occupation, To-wit: That of a Labor Union Official, Was Unduly Impaired by the Contempt Judgment.

(a) Democratic Unionism Requires That Union Members Be Constantly Informed of the Activities of Their Leaders.

True democracy for the individual worker requires application of the principles of democracy to the internal life of the labor union to which he belongs. Dictatorship, secret negotiations;—all acts on the part of union officials without the knowledge of the membership, run counter to the basic principles of democracy in trade unions, just as such acts abridge political democracy. It is essential, therefore, that all union acts be made known to the membership of the union. As a practical matter, in the case of large unions such as the Longshoremen, this inevitably results in general publication. In fact, the trial judge in this case, recognized as one legitimate purpose for the sending and publication of the telegram "to let the employers and employees know that the matter was being energetically watched" [R. 47].

Here, then, we have the anomalous situation of the petitioner doing a *lawful* act (it is conceded that the mere sending of a telegram to the Department of Labor is lawful) in a *democratic* manner, and the State court inflicting punishment for failure to suppress and conceal this lawful act.

(b) In a Case Such as This, Where the Public Interest Is Involved, Proper Functioning of a Union Official Requires That the Public Be Informed of the Steps Taken by Him to Prevent a Tie-Up of Commerce.

The general public was vitally concerned with the subject matter of the telegram. Generally speaking, the public is directly affected by all labor disputes, and particularly by the controversy involved herein, the result of which might have been a serious and complete tie-up of all Pacific Coast ports. The trend today is toward greater dissemination of information concerning labor disputes and toward full public discussion of the problems involved.[38] It has been the universal experience that the bringing of all pertinent facts into the light of public day tends to expose the causes of labor unrest, and to avert strikes and the interruption of industrial peace. Nevertheless, it is charged in the instant case, that the failure to suppress and conceal lawful acts of great public concern constitute a contempt of court.

Accordingly, the sending of a telegram by a union official to the United States Department of Labor protesting a decision of a State court and pointing out that its enforcement will result in a serious interference with interstate commerce, is a reasonable and necessary part of a union official's occupation.

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[38]"Free discussion concerning the conditions in industry and the causes of labor disputes appear to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." (Justice Murphy in *Thornhill v. Alabama, supra.*)

If collective bargaining, and legitimate labor unions as the instruments for the effectuation of collective bargaining, are to continue to have the effective sanction of the law, labor union officers must be permitted and encouraged to function, not in a vacuum, nor in secrecy, but in the open, and publicly. They should be protected in, and not penalized for, the exercise of their legitimate duties. If democracy in trade unionism is to be favored by the law, labor union officers should be encouraged to expose their every act, both to their constituents and to the general public through the instrumentality of the public press, which reaches both.

The litigation in the *Walker* case was of great public interest. The possibility of a Pacific Coast waterfront tie-up resulting from Judge Schmidt's decision was of grave public concern. The public was entitled to know every legitimate step taken by the petitioner in behalf of the union and its thousands of members to avert the danger of such a tie-up; the petitioner in dispatching the telegram complained of to the Secretary of Labor and in publicizing its contents in the public press, if it is determined that he is responsible for such publication, was merely fulfilling his duty both to his constituents and to the public.

(c) The Right to Pursue Any Calling or Profession May Not Be Unreasonably Restricted or Regulated.

That the right to engage in a lawful occupation is protected by the Fourteenth Amendment to the Constitution of the United States is well established.

This court has looked through the forms of restrictions upon employment to their essence, and pointed out their real effect.

Truax v. Raich, 239 U. S. 33, 41.

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment (14th) to secure."
>
> *Myer v. Nebraska*, 262 U. S. 390, 399.

It would seem that the right of the petitioner to carry on his occupation as a labor union official is hence protected by the Fourteenth Amendment.

To say that a person may engage in an occupation and at the same time make it criminal for him to perform the acts required thereby, is in effect to completely nullify the constitutional right to engage in that occupation at all.

Accordingly, a judgment which penalizes the petitioner for a legitimate act in the exercise of his lawful occupation offends federal due process.

Point 4.

There Is No Evidence to Support the Conviction of Contempt. A Contempt Judgment, Based Upon a Publication, in the Absence of Supporting Evidence, Denies Federal Due Process.

This Court will review the evidence when a Federal right has been specially set up, and claimed in a State court.

Norris v. Alabama, 294 U. S. 587;
Pierre v. Louisiana, 306 U. S. 354.

The evidence, which constitutes the basis for the conviction of the petitioner, has been set forth heretofore;[39] and will not be repeated here.

A contempt proceeding is essentially criminal and penal in nature.

Gompers v. U. S., 233 U. S. 604, 610;
Michaelson v. U. S., 266 U. S. 42.

The sentence imposed upon the petitioner by the trial court was penal. He was fined, and given a jail sentence in the alternative.

The evidence against the petitioner discloses a failure of proof of personal participation in the publication of the telegram complained of.

A judgment of conviction of contempt in the absence of such participation in the alleged offense denies federal due process.

Hoover v. Wise, 91 U. S. 308.

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[39] *Infra*, pp. 29-30.

Conclusion.

In other lands throughout the world, the beacons of liberty are dimmed; in many extinguished.

First of the democratic institutions to be crushed under the dictator's heel is a free press; second, the trade unions.

This court, in the last half decade, has scrupulously protected both these institutions. Freedom of thought, freedom of speech and freedom of the press have been safeguarded from state legislative and executive encroachment; the same protection should be accorded these "essential liberties" when the invader is the judicial department of a state.

Only thus—and through the exercise of "judicial self-restraint"— will the courts continue to serve as the guardians of the constitutional liberties of all of the people.

Respectfully submitted,

A. L. WIRIN,

Counsel for Petitioner.

LEO GALLAGHER,

GROVER JOHNSON,

BEN MARGOLIS,

RICHARD GLADSTEIN,

AUBREY GROSSMAN,

CHARLES J. KATZ,

Of Counsel.